Public Prosecutor v Othman bin A Aziz

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 45B-41–10 OF 2011
MOHD ZAKI ABDUL WAHAB JC
25 AUGUST 2012

Criminal Law — Murder — Defence of provocation — Whether prosecution made out prima facie case against accused — Defence of unsoundness of mind — Whether established — Whether refusal to go through planned marriage constituted grave and sudden provocation — Penal Code ss 84 & 302

Evidence — Circumstantial evidence — Murder — No direct evidence — Whether accused caused death of deceased — Whether evidence adduced proved guilt of accused — Whether accused succeeded in raising doubt to prosecution's case

Evidence — Confession — Voluntariness — Accused confessed killing deceased to witness — Whether made voluntarily — Objection as to voluntariness not raised — Whether admissible — Evidence Act 1950 s 24

Evidence — Hearsay — Oral hearsay — Accused confession to witness in lock-up — Whether hearsay evidence — Whether admissible

Evidence — Statement — Unsworn statement — Probative value — Whether can of itself, raise any doubt on prosecution's case — Whether unsworn statement can be brushed aside — Whether accused unsworn statement must be considered in totality and together with whole evidence — Criminal Procedure Code 182

The accused was charged for murdering one Ratna Suffizahriyanti bt Omar, an offence under s 302 of the Penal Code ('Code'). The deceased's body was discovered by a police team, acting upon a police report lodged by the accused himself, from the room occupied by the accused. The facts lead by the prosecution showed that accused worked as a cook at D'Suasana Restaurant which was owned by SP9. Usually, the accused worked daily at the restaurant until midnight. The room in which the body was found was rented by SP9 for the accused to occupy. On the day of the incident, the accused had, at around 9pm, requested permission from SP9 to return to his room, which SP9 granted. The accused returned to the restaurant the same night at about 12.00 to 12.30 midnight. According to SP9, the accused who was looking confused

and agitated, told SP9 that he had murdered the deceased, by pointing to a photograph of the deceased from the photo frame which he had with him in his bag. He also told SP9 that he had with him in his bag the deceased's personal belongings and the knife he used to kill the deceased. SP9 then advised the accused to surrender himself to the police, to which the accused readily agreed. SP9 then took the accused together with the bag and the photo frame to lodge a police report. The accused then informed SP5, the police on duty, of the incident. The accused also surrendered the bag that contained the deceased's personal belongings and knife to SP5. Thereafter, SP8, the investigation officer on duty, together with the accused and SP9 proceeded to the accused's room. On arrival at the room, SP8 saw body of the deceased lying on the floor, wrapped with a blanket. SP4, who conducted the post-mortem examination on the body, concluded that the death was caused by stabs wound injuries on her thorax. The accused, who opted to give an unsworn statement from the dock, stated that on the night of the incident, he met the deceased in his room and had conversation with her until the stage where the deceased told him that she had decided not to go through with the marriage. This had upset the accused so much that he lost of his senses. The accused stated that from that moment on he did not realise what had actually happened. He said, when he recovered his senses he found the deceased was already on the floor, bleeding and breathless. The issues considered by this court, inter alia, were as follows; (i) whether the prosecution had established that the very act or several acts of the accused had caused the death of the deceased; (ii) whether the act of the accused fell within one of the four limbs stated under s 300 of the Code; and (iii) whether the accused had successfully raised the defence of unsoundness of mind at the time of committing the murder.

Held, finding the accused guilty, convicting and sentencing to death:

(1) The evidence clearly showed that SP9 heard the confession of the accused killing the deceased, on two occasions: firstly, on the very night itself, upon the accused returning to the restaurant. Secondly the accused confessed to SP9 of murdering the deceased when SP9 visited him in the lock-up. The confessions were admissible for two reasons. Firstly, there was no objection raised by the defence as to their voluntariness, therefore it was safe to make a finding that the confession was made voluntarily. Secondly, there was no evidence that showed that the confession was not voluntarily made by the accused to SP9 (see paras 24–25).

(2) Further, from the evidence of the number of injuries and the nature of injuries found by SP4, it was safe to infer that the accused had the intention to cause death to the deceased when he committed the act of stabbing and slashing the deceased. Hence, the prosecution had made out a prima facie case against the accused for an offence punishable under s 302 of the Code (see paras 33–34).

(3) The defence had not produced any evidence that showed he was of unsound mind at the material time. A mere statement in the accused's unsworn statement that he did not realise what actually happened cannot, by any stretch of imagination amount to evidence to prove he was of unsound mind at the particular time. Further, the defence had failed to lead evidence to prove the status of the accused's mental capacity at the time when he stabbed and slashed the deceased (see paras 53–54).

(4) Although the certificate issued by the psychiatrist which had confirmed that the accused was sane at the time of the commission of the crime was not produced as an exhibit by the prosecution, the court was nevertheless entitled to take judicial notice on the existence of the certificate as it was issued in pursuant to the court's order for the accused to be examined by a psychiatrist. Nothing turns upon the failure to produce the certificate as the legal burden of proving the defence of unsoundness of mind lay on the defence (see para 55).

(5) Furthermore, thecourt having the benefit of audio visual and having observed the conduct of the accused during the entire trial, did not for one moment think that the accused could be suffering from an unsound mind. On the contrary, the accused was lucid at all times during trial (see para 57).

[Bahasa Malaysia summary

Tertuduh dituduh membunuh Ratna Suffizahriyanti bt Omar, suatu kesalahan di bawah s 302 Kanun Keseksaan ('Kanun'). Mayat si mati ditemui oleh pasukan polis, yang bertindak atas laporan polis yang dibuat oleh tertuduh sendiri, di bilik yang didiami tertuduh. Fakta-fakta yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa tertuduh bekerja sebagai tukang masak di Restoran D'Suasana yang dimiliki oleh SP9. Kebiasaannya, tertuduh bekerja setiap hari di restoran sehingga tengah malam. Bilik di mana mayat tersebut telah ditemui, disewa oleh SP9 untuk didiami oleh tertuduh. Pada hari kejadian, tertuduh telah, pada sekitar 9 malam, telah meminta kebenaran daripada SP9 untuk kembali ke biliknya, dan dibenarkan oleh SP9. Tertuduh kembali ke restoran pada malam yang sama kira-kira jam 12 hingga 12.30 tengah malam. Menurut SP9, tertuduh yang kelihatan keliru dan gelisah, memberitahu SP9 bahawa dia telah membunuh si mati, dengan menunjukkan gambar si mati dalam bingkai foto dalam begnya. Dia juga memberitahu SP9 bahawa bersama-sama dalam begnya merupakan barangan peribadi si mati dan pisau yang digunakan untuk membunuh si mati. SP9 kemudian menasihatkan tertuduh agar menyerah diri kepada polis, yang mana dipersetujui oleh tertuduh. SP9 kemudian membawa tertuduh bersama-sama dengan beg dan bingkai foto tersebut untuk membuat laporan polis. Tertuduh kemudiannya memaklumkan SP5, polis yang bertugas bagi kejadian tersebut. Tertuduh juga menyerahkan beg yang mengandungi barangan peribadi si mati dan pisau kepada SP5. Selepas itu, SP8, pegawai penyiasat yang bertugas, bersama-sama

dengan tertuduh dan SP9 telah ke bilik tertuduh. Setibanya di bilik tersebut, SP8 melihat mayat si mati di atas lantai, dibaluti selimut. SP4, yang menjalankan pemeriksaan post-mortem ke atas mayat tersebut, memutuskan bahawa kematian disebabkan oleh kecederaan luka tikaman pada thoraxnya. Tertuduh, yang memilih untuk memberi kenyataan bersumpah dari kandang tertuduh, menyatakan bahawa pada malam kejadian, dia menemui si mati dalam biliknya dan telah berbual dengannya sehinggalah si mati memberitahunya dia tidak mahu meneruskan lagi perkahwinan tersebut. Ini amat mengecewakan tertuduh sehingga dia hilang pertimbangan. Tertuduh menyatakan bahawa mulai saat itu dia tidak sedar apa yang sebenarnya telah berlaku. Tertuduh menghujahkan bahawa apabila dia sedar semula, dia mendapati si mati sudah berada di atas lantai, berdarah dan tidak bernyawa. Isu-isu yang dipertimbangkan oleh mahkamah ini, antara lain, adalah seperti berikut; (i) sama ada pihak pendakwaan telah membuktikan bahawa perbuatan tersebut atau beberapa perbuatan tertuduh telah menyebabkan kematian si mati; (ii) sama ada perbuatan tertuduh terjumlah di bawah salah satu daripada empat bahagian yang dinyatakan dalam s 300 Kanun Keseksaan; dan (iii) sama ada tertuduh telah berjaya membangkitkan pembelaan ketaksempurnaan akal ketika melakukan pembunuhan tersebut.

Diputuskan, mendapati tertuduh bersalah, mensabitkan dan menjatuhkan hukuman mati:

(1) Bukti jelas menunjukkan bahawa SP9 mendengar pengakuan tertuduh membunuh si mati sebanyak dua kali: pertama, pada malam kejadian, apabila tertuduh kembali ke restoran. Kedua, tertuduh mengaku membunuh si mati kepada SP9 apabila SP9 melawatnya di dalam lokap. Pengakuan boleh diterima atas dua sebab. Pertama, tiada bantahan yang dibangkitkan oleh pihak pembelaan atas kesukarelaan tertuduh, oleh itu adalah selamat untuk membuat dapatan bahawa pengakuan dibuat secara sukarela. Kedua, tidak ada bukti yang menunjukkan bahawa pengakuan dibuat kepada SP9 adalah secara tidak sukarela (lihat perenggan 24–25).

(2) Tambahan lagi, daripada bukti bilangan dan jenis kecederaan yang didapati oleh SP4, adalah selamat untuk meyimpulkan bahawa tertuduh mempunyai niat untuk menyebabkan kematian ke atas si mati apabila dia telah melakukan perbuatan menikam dan mengelar si mati. Oleh itu, pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap tertuduh bagi kesalahan yang boleh dihukum di bawah s 302 Kanun (lihat perenggan 33–34).

(3) Pembelaan tidak mengemukakan sebarang keterangan yang menunjukkan tertuduh tidak sempurna akal pada masa material. Kenyataan semata-mata dalam kenyataan bersumpah tertuduh bahawa dia tidak menyedari apa yang sebenarnya berlaku tidak boleh, dalam apa

jua keadaan, terjumlah kepada keterangan untuk membuktikan dia tidak sempurna akal pada masa tertentu. Di samping itu, pihak pembelaan telah gagal untuk mengemukakan keterangan untuk membuktikan status kapasiti mental tertuduh ketika dia menikam dan mengelar si mati (lihat perenggan 53–54).

(4) Walaupun perakuan yang diisukan oleh pakar psikiatri yang telah mengesahkan bahawa tertuduh waras pada masa pelakuan jenayah tidak dikemukakan sebagai ekshibit oleh pihak pendakwaan, mahkamah berhak untuk mengambil notis kehakiman terhadap kewujudan sijil tersebut kerana ia telah diisukan menurut perintah mahkamah agar tertuduh diperiksa oleh pakar psikiatri. Tiada apa-apa yang timbul daripada kegagalan untuk mengemukakan perakuan tersebut kerana beban undang-undang untuk membuktikan pembelaan tidak sempurna akal terletak pada pembelaan (lihat perenggan 55).

(5) Tambahan lagi, mahkamah mempunyai manfaat audio visual dan setelah diamati perilaku tertuduh sepanjang perbicaraan, tidak sekali pun didapati bahawa tertuduh tidak sempurna akal. Sebaliknya, tertuduh waras sepanjang perbicaraan (lihat perenggan 57).]

Notes

For a case on defence of provocation, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1513.

For cases on murder, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 791–798.

For cases on oral hearsay, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1923–1925.

For cases on voluntariness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 964–998.

Cases referred to

Ahmad Faizal Ali bin Aulad Ali & Ors v PP [2010] 2 MLJ 547, HC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)
Juraimi bin Hussin v PP [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
Kishore Chand v State of Himachal Pradesh AIR 1990 SC 2140 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
PP v Arokiasamy a/l Alphonso [2012] 1 MLJ 165, CA (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chong Soon Wah [2009] 7 MLJ 865, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Muhammad Rasid bin Hashim [2011] 7 MLJ 845, HC (refd)

PP v Salleh bin Zakaria & Anor [2010] 4 MLJ 25, CA (refd)
PP v Sanin bin Othman [2011] 5 MLJ 716, CA (refd)
PP v Shariff bin Kadir [1997] MLJU 158; [1997] 5 CLJ 463, HC (refd)
Teuku Nawaardin Syamsuar v PP [2011] 3 CLJ 353, FC (folld)
Wongheng Fatt v PP [1959] 1 MLJ 20 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code ss 173(m), 182
Evidence Act 1950 ss 24, 105
Penal Code ss 84, 299, 300, 302, 304

Wan Nor Hasnita bt Wan Daud (Deputy Public Prosecutor, Kedah State Legal Advisor Office) for the prosecution.
AJ Surinarayanam (Suri & Co) for the accused.

Mohd Zaki Abdul Wahab JC:

THE CHARGE

[1] The accused was charged with an offence under s 302 of the Penal Code. The charge against him is as follows:

> Bahawa kamu pada 2 Mei 2011 antara jam lebih kurang 8.45 malam hingga 03 Mei 2011 jam lebih kurang 12.45 pagi, bertempat di dalam bilik No. G 12, di sebuah rumah No 1926H, Taman Mahkota, Jalan Stadium, Alor Setar, di dalam daerah Kota Setar, dalam Negeri Kedah Darulaman, telah melakukan pembunuhan dengan melakukan perbuatan yang menyebabkan kematian ke atas Ratna Suffizahriyanti binti Omar (No KP; 880705-26-5534). Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

PROSECUTION CASE

[2] The prosecution called ten witnesses to prove the case against the accused. Briefly, the prosecution brought in evidence to show that a women, Ratna Suffizahriyanti bt Omar (IC No 880705–26–5534) was found dead in room No G12, house No 1926H, Taman Mahkota, Jalan Stadium, Alor Setar on 3 May 2011. The body was found by a police team who went to the room acting upon a police report lodged by the accused himself. The room, where the dead body was found, was actually occupied by the accused.

[3] The facts lead by the prosecution showed that accused worked as a cook

at D'Suasana Restaurant, owned by Hj Abdul Halim bin Osman ('SP9'). Usually, the accused will be working daily at the restaurant until midnight. He was provided with a room to stay by his employer. The room in which the body was found was rented by SP9 for the accused to occupy.

[4] On 2 May 2011 the accused worked as usual. However at around 9pm, the accused requested permission from SP9 to return to his room, which permission SP9 granted. He then went off to his room. At about 12–12.30 midnight, on 3 May 2011 the accused returned to the restaurant. According to SP9 he was about to close the business for the day when the accused came in. The accused looked confused and agitated, as though he was having a problem. On arrival he approached SP9.

[5] SP9 took him to a table, trying to calm him down. SP9 then talked to him and asking him of his problem. The accused told SP9 he had committed a crime, that he had murdered someone in his room. The accused then had with him a bag and a photo frame. He pointed to SP9 a photograph of a woman in the photo frame and stated that he had murdered her. He also told SP9 that he had with him the deceased's personal belonging and a knife he used to kill the deceased in the bag. He wanted to show the knife to SP9. However SP9 refused to see the knife.

[6] Oh hearing the accused narrative, SP9 advised the accused to surrender himself to the police, to which the accused readily agreed. SP9 then took the accused together with the bag and the photo frame to Alor Setar's Police Station. On arrival at the station, the accused lodged a police report, informing police on duty, Corporal Mohd Rizal ('SP5'), of the incident. The accused also surrendered the bag that contained the deceased's personal belonging and knife to SP5. SP5 later relayed the information to the investigation officer on duty, Insp Johari bin Yahya ('SP8').

[7] SP8 thereafter came to the police station and had a short interview with the accused before proceeding to the accused's room. The accused together with SP9 followed him. On arrival at the room, SP8 saw body of the deceased lying on the floor, wrapped with a blanket.

[8] The body was later sent to Sultanah Bahiyah Hospital, where she was declared dead. Post-mortem examination on the body was conducted on the next morning by Dr Suhani bin Mohd Noor ('SP4').

PRIMA FACIE CASE

[9] That above is essentially the case for the prosecution and upon conclusion of the prosecution case had argued that a prima facie case has been

made out and that the accused should be called to enter his defence. Now, it is trite law that the prosecution had the duty to prove a prima facie case against the accused at the end of the case for the prosecution. The burden placed on the prosecution and the meaning of a prima facie case had been clearly explained in a plethora of cases. In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 the Federal Court explained the burden to be proved by the prosecution at the end the prosecution case as follows:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[10] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, the Federal Court explained that:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. …
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established.

[11] It is clear from decided authorities, including the two cases that I have referred to above, that procedurally, the prosecution must produce evidence to discharge the burden of proof of a prima facie case. The evidence adduced not only must be admissible but also believable evidence. It follows therefore that no prima facie can be made out if the prosecution relies on evidence that is inadmissible. Similarly, there would not be sufficient evidence to prove a prima facie case if the prosecution only produce admissible evidence but that evidence cannot be believed at all.

[12] It is also axiomatic that the court, at the end of the prosecution's case, must undertake a proper evaluation of the admissible and believable evidence in order to decide whether a prima facie case has been made out. At this juncture, in my judgment, from the reading of decided authorities, the

evidence must prove all the ingredients of the offence charged against the accused (see the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

INGREDIENTS OF THE OFFENCE

[13] The accused was charged for an offence of murder under s 302 of the Penal Code. The prosecution must produce evidence to sufficiently show: firstly, the accused had committed the actus reus, by causing the death of the deceased (culpable homicide); and secondly, that the accused had caused the death with sufficient mental element — mens rea.

[14] What constitute culpable homicide has been defined under s 299 of the Penal Code, which provides:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[15] The main ingredients under s 299 are the death of a person as the result of the act or acts of the accused. Therefore the prosecution must prove the accused had, by doing an act or by doing several acts closely connected, caused the death of the deceased.

[16] As stated earlier the actus reus alone is insufficient. The prosecution also had a further duty to prove mental elements of the accused in causing the death of the deceased. This was provided for under s 300 of the Penal Code. The act or several acts of the accused that caused the deceased's death must fall within any limb of s 300 of the Penal Code. Section 300 of the Penal Code provide as follows:

> Section 300. Murder
>
> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous

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> that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

B

[17] In the charge framed against the accused, the deceased was said to be a women named as Ratna Suffizahriyanti bt Omar. Consequently, it is very important for the prosecution to prove the deceased person was the person named in the charge. Basically the prosecution must bring evidence to prove identity of the deceased. The prosecution called SP1, said to be the mother of Ratna Suffizahriyanti bt Omar to prove identity of the deceased. SP1 had in her

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evidence, clearly identified the deceased as Ratna Suffizahriyanti bt Omar, through the photographs shown to her. The evidence also showed she had identified the deceased as Ratna Suffizahriyanti before a post-mortem was performed on her body.

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[18] The defence had not challenged these pieces of evidence. Beside SP1's evidence, the prosecution also brought in the evidence that the body was identified as the deceased by police officer, before the post-mortem examination performed by SP4. I am satisfied the deceased in this case was a

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women named Ratna Suffizahriyanti bt Omar, as stated in the charge.

[19] The next fact that must be proved by the prosecution the very act or several acts of the accused that caused the death of the deceased. Essentially, there was neither eyewitness who had seen the act of the accused in causing the

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death of the deceased, nor any other direct evidence that proved that the accused caused the death. Under the circumstances, the prosecution has had to rely on indirect or circumstantial evidence to secure conviction against the accused.

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[20] The law on circumstantial evidence is clear. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, the Federal Court made the following pertinent statements which has stood the test of times:

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> Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors v Public Prosecutor* [1982] 2 MLJ 306, 310).

I

[21] In *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, the Federal Court discussed the status of circumstantial evidence and in the process adopted the decision of the Indian Supreme Court in *Kishore Chand v State of Himachal Pradesh* AIR 1990 SC 2140 which said:

The entire prosecution case rested on circumstantial evidence …

The question, therefore, is whether the prosecution proved the guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. … The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. … In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established …

… If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt. …There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused …

… In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

[22] It is clear from the cases cited above the circumstantial evidence that proves the guilt of the accused must be fully established by the prosecution. Such evidence must be consistent and complete to show that the accused alone had committed or carried out an act or several acts that had caused the death of the deceased. In *Magendran a/l Mohan v Public Prosecutor* the Federal Court ordered an acquittal of the appellant, having satisfied the circumstantial evidence in the case was not sufficient to convict him.

[23] In the present case, having carefully examined the evidence before me, I found the following evidence of circumstances that proved the nexus between the accused and the death of the deceased. The evidence are as follows:

(a) the death body was found in a room where the accused had been living. It was also established that he lived there alone;

(b) the accused asked permission from his employer, SP9 to return to his room early on the day of incident. The accused did return to his room after being permitted to do so by SP9. The accused later came back to the restaurant on that late night showing signs of having a big trouble in his mind;

(c) The accused later confessed to SP9 of committing the murder. The accused even showed to SP9 the deceased photograph in a frame which he carried along to the restaurant;

(d) the accused also carried along a bag on his return to the restaurant. He

told SP9 there were personal belongings of the deceased inside the bag. The accused also wanted to show to SP9 a knife that he said was used to stab the deceased;

(e) the accused had willingly followed SP9 to Alor Setar's Police Station, where he himself lodged a police report. He later guided police to the room where the dead body was found; and

(f) the accused again told SP9 he killed the deceased after being told by the deceased she is not going to marry him. This statement was made to SP9 when SP9 visited him in the lock-up.

[24] The evidence clearly showed SP9 heard the confession of the accused of killing the deceased, in two occasions: firstly, on the very night itself, upon the accused returning to restaurant. Secondly the accused confessed to SP9 of murdering the deceased when SP9 visited him in the lock-up.

[25] A confession could be admitted under s 24 of the Evidence Act 1950 if it was proved to be made voluntarily. In the present case I found the confessions are admissible for two reasons. Firstly, there was no objection raised by the defence as to their voluntariness, therefore it is safe to make a finding that the confession was made voluntarily. Secondly, I having scrutinised the evidence, I found that there was no evidence, in my judgment, that tends to show that the confession was not voluntarily made by the accused to SP9.

[26] These confessions are material evidence that tend to support the prosecution's case that the accused had killed the deceased. Being important evidence, defence counsel should have cross-examined SP9 on this aspect. However, counsel for the accused had not, for reasons which are unclear to me, cross-examined SP9 on these confessions. That being the case it is the rule of evidence that the defence is deemed to admit material evidence by his failure to cross-examine witness on the material evidence (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212).

[27] The defence however has, actually raised an argument as regard to the confession made by the accused on SP9 in the lock-up. It was canvassed before me that that piece of evidence was not admissible for being hearsay evidence. With due respect to the defence counsel, that argument has no basis, for it ignores the very basic underpinning of the hearsay rule. It is to be noted that SP9 related in his evidence on what he had heard directly from the accused. The confession was not heard by SP9 from any third party. He had heard them directly from the accused. The evidence could not be said to be hearsay evidence when it was heard directly from the person who said it.

[28] I had fully considered the circumstantial evidence that existed in this

case. I had subjected them to a maximum evaluation. I found that these circumstances, when taken together, had led to only one possible conclusion, namely the accused was the one who inflicted the stab wounds and slash wounds on the deceased body that caused her death.

[29] Having found the accused had caused the death of the deceased, I now had to consider the 'mens rea' of the accused in causing the death. The question should I asked is 'whether the act of the accused fall within one of the four limbs stated under s 300 of the Penal Code'?

[30] It the circumstances of this case, I accept that it is not possible to prove the intention of an accused to commit a crime by direct evidence. As such the intention of an accused in committing crime had to be inferred from the circumstances surrounding the crime, (see *Public Prosecutor v Salleh bin Zakaria & Anor* [2010] 4 MLJ 25, *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585).

[31] In any murder trial, the types, number and nature of injuries inflicted on the deceased body may be considered in inferring the intention of the person so charged to commit murder. In *Public Prosecutor v Sanin bin Othman* [2011] 5 MLJ 716 Suriyadi JCA said at p 720:

> [19] Since it is no easy task to establish the ingredient of intention it thus has to be established by inferences arrived at from the evidence made available. The evidence before the court was more than ample to establish that ingredient. To reiterate, the two injuries were caused by a dangerous instrument ie a knife. The injuries were deep and never mere slash wounds. With such wounds, which must have required great force, it would defy logic that the respondent did not intend to kill or cause serious injury on the deceased (*Tan Buck Tee v Public Prosecutor*).

[32] SP4, the forensic pathologist who had performed the post-mortem on the body testified that he had found 26 stab wounds and four slash wounds on the deceased body. Most of the stab wounds were found on the thorax area, and mostly on the chest and the back. Some of the wounds penetrated the deceased's vital organs and these caused the deceased's death. SP4 concluded that the death was caused by stabs wound injuries on her thorax. SP4 also said the injuries were neither possible to be self-inflicted nor could the injuries be accidentally inflicted.

[33] From the evidence of the number of injuries and the nature of injuries found by SP4, it is safe to infer that the accused had the intention to caused death to the deceased when he committed the act of stabbing and slashing the deceased.

[34] On the totality of the evidence I found that the prosecution had made out a prima facie case against the accused for an offence punishable under s 302 of the Penal Code. I therefore ordered the accused to enter his defence against the charge.

THE DEFENCE OF THE ACCUSED

[35] The accused opted to give unsworn statement from the dock. Thus he cannot be subjected to cross-examination by the prosecution for whatever statement he made from the dock. In his statement the accused explained he had knew the deceased for a long time. They were in a relationship and had planned to marry. Initially the marriage was supposed to take place in April, but it did not materialise. On the night of the incident, the accused admitted to meeting the deceased. Prior to the meeting the deceased called him and informed him that she will be coming to his room. Despite his attempt to stop the deceased from coming to his room, the deceased arrived at his room at around 9 o'clock.

[36] The accused did not deny he had sought permission from SP9 to return to his room. He then met the deceased in his room and had conversation with the deceased until at the stage where the deceased told him she has decided that she was not going through with the marriage. This, according to the accused, upset him so much as he had left behind his family and moved to Alor Setar to be with the deceased.

[37] The accused further said at that moment, upon hearing the snub, he lost all his senses. He said from that moment on he did not realise what actually happened. He said, when he recovered his senses he found the deceased was already on the floor, bleeding and breathless. He decided to return to the restaurant and confessed the crime to SP9. Subsequently, SP9 took him to the police station for him to surrender himself.

[38] The accused did not call any witness to support his unsworn statement from the dock.

[39] As clearly stated in *Balachandran v Public Prosecutor*, a prima facie case can only be doubted by evidence produced by the defence, sufficient to rebut the prosecution's case. The accused's defence rested purely on an unsworn statement. The question is whether this is sufficient to raise doubt to the prosecution case?

[40] It is instructive at this juncture to state a few word on the effect of an

unsworn statement by an accused person. In *Wongheng Fatt v Public Prosecutor* [1959] MLJ 20 at p 21 Smith J considered the nature of this kind of evidence. His Lordship said:

> I do not consider that statement by an accused from the dock is evidence.

[41] In *Public Prosecutor v Shariff bin Kadir* [1997] MLJU 158; [1997] 5 CLJ 463, Hishamudin Yunus J (as His Lordship then was) also considered an accused's unsworn statement from the dock not as an evidence and therefore cannot, of itself, raise any doubt on the prosecution's case.

[42] However in *Public Prosecutor v Chong Soon Wah* [2009] 7 MLJ 865 however, Azhar Mohammad J (as His Lordship then was) came to a different conclusion and accepted the unsworn statement as an evidence. There were many other cases that accepted unsworn statement from the dock as evidence.

[43] For my part, the better view would be that expressed by Azhar Mohamad J in *Public Prosecutor v Chong Soon Wah*, as to the status of the statement. In my view, the unsworn statement is evidence which must be considered. In my view the decision of the Federal Court in *Teuku Nawaardin Syamsuar v Public Prosecutor* [2011] 3 CLJ 353 had made the position very clear and that the only consideration is the weight to be attached to the statement given that the unsworn statement is not subject to cross-examination and therefore the truth and reliability of the statement had not been fully tested.

[44] In *Teuku Nawaardin Syamsuar v Public Prosecutor* Heliliah FCJ said as follows:

> [15] In the present appeal the appellant had chosen to furnish an unsworn statement from the dock and no other witness was called for the defence. The decision in *Mohammed Salleh v Public Prosecutor* [1968] 1 LNS 80 is useful. In the words of Wee Chong Jin CJ:
>
> > In our judgment, the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an express statutory provision to that effect.

With regard to the question of prejudice arising out of the trial judge's comment on the probative value of the unsworn statement of the appellant, we are of the opinion that it is proper for a judge in summing up to remind the jury that a statement from the dock is not sworn evidence which can be the subject of cross examination; that they can attach to it such weight as they think fit and that they should take it into consideration in deciding whether the prosecution have proved their case. In the present case the trial judge directed the jury as follows:

> Well, members of the Jury, that is the case for the prosecution. Now what is the accused's defence to this charge? You must also consider his evidence, or rather you must consider his defence. The accused, as you know, did not give evidence on oath. He made a statement from the dock and he could not be cross-examined by the prosecution, he could not be questioned by me, he could not be questioned by you. Members of the Jury, you will naturally not be inclined to give so much weight to what he said in the dock as you would if he gave evidence, because when a man gives evidence one can cross-examine on it and test it and generally have a much better opportunity of assessing it. Of course, you must not reject the statement of the accused, you must consider it and give it such weight as you think it is worth having regard to the other evidence that you have.

[16] While that case pertains to a trial with a jury nevertheless the guidelines established is still applicable with respect to the probative value to be accorded to the unsworn statement that is a judge will naturally not be inclined to give so much weight to what he said in the dock as you would if he gave evidence as there was no opportunity of cross examining him in order to test the veracity of his evidence as opposed to that of the prosecution.

[45] Based on the guidance by the Federal Court which I have quoted *in extenso* in my judgment in dealing with the unsworn statement the judge or magistrate, in evaluating the evidence, must not brush aside the unsworn statement and proceed to make a finding of guilt on the part of the accused. In my judgment the trial court must consider the accused's defence as contained in the unsworn statement in light of other evidence tendered by the prosecution. In other words at the end of any criminal trial the whole evidence produced in the case must be considered in totality. This is clearly required by s 182 of the CPC in the case of High Court trial (s 173(m) in the case of subordinate court trial). The accused unsworn statement must be considered in totality and together with the whole evidence. It cannot be considered in isolation. In find support for the view that I have stated herein from established authorities. In *Public Prosecutor v Muhammad Rasid bin Hashim* [2011] 7 MLJ 845 Abang Iskandar J had the opportunity to consider unsworn statement and made the following observations:

> In order to properly appreciate that unsworn statement made by the accused from the dock (D64) it ought not however, to be considered in isolation. Rather, it must be juxtaposed side by side with the evidence led by the prosecution witnesses. In so

doing, the court must also consider the inherent credibility or otherwise of such statement as contained in D64. This court must also compare it with the credible evidence led by the prosecution …

[46] In *Ahmad Faizal Ali bin Aulad Ali & Ors v Public Prosecutor* [2010] 2 MLJ 547 Yeoh Wee Siam JC (as Her Lordship was) had, in considering such statement said:

> [113]From the above, it is clear that an accused person has a procedural right to opt to give his evidence for his defence by way of an unsworn statement from the dock. However, the accused person would not be subject to cross-examination for such statement made. Therefore, such unsworn statement has to be evaluated by the trial judge and given the weight as the trial judge thinks fit, but the weight accorded cannot be as much as the weight that a trial judge would give to a sworn statement given by an accused person from the witness box.
>
> [114]In the instant case, the trial judge held that it was difficult to give value to the unsworn statements given by the three appellants from the dock, and she finally decided that she could only give very little weight to such evidence.
>
> [115]I am of the opinion that the unsworn statements from the dock of the three appellants given for their defence do not have much weight, as correctly decided by the trial judge. The trial judge also held that the defence of the three appellants is a mere denial and, therefore, there was no reasonable doubt raised by the defence to rebut the prosecution's case.

[47] In the present case counsel for the defence argued the accused had successfully raised the defence of unsoundness of mind at the time of committing the murder. The defence of unsoundness of mind is provided under s 84 of the Penal Code which provides:

> Section 84. Act of a person of unsound mind.
>
> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[48] The defence of unsoundness of mind is one of general defences provided by Penal Code under s 84. Once raised, it is become the duty of the accused to prove his defence as provided under s 105 of the Evidence Act 1950. In other words the defence bears the legal burden of proving the defence. Section 105 provides:

Burden of proving that case of accused comes within exceptions

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or provision contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

ILLUSTRATIONS

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act. The burden of proof is on A.

(b) A accused or murder alleges that by grave and sudden provocation he was deprived of the power of self control. The burden of proof is on A.

[49] In *Juraimi bin Hussin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383 Federal Court at p 574 (MLJ) p 422 (CLJ) held:

We are, on the other hand, entirely in agreement with the submission made by the learned deputy, Encik Azahar, that the burden of establishing the defence of insanity lay upon the first accused (see *Public Prosecutor v Alang Mat Nasir* [1938] MLJ 153; *Jusoh v Public Prosecutor* [1963] MLJ 84) and that he had plainly failed to do this. The learned deputy drew our attention to the absence of any cross-examination of the prosecution witnesses on the insanity issue. We were also referred to passages in the evidence-in-chief of the first accused where he clearly explains the premeditation with which the murder of the deceased had been planned and executed. We are in agreement with Encik Azahar that the revelations made by the first accused are the product of a mind uninfected by any illness of any sort.

[50] In *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509 the Court of Appeal had stated as follow as regard to a defence of unsoundness of mind:

[16] When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law (see *Ratanlal and Dhirajlal's Law of Crimes*, (25th Ed), p 289 et seq).

[51] The Court of Appeal further emphasised:

[14] Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.

[15] There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, (25th Ed), p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378.

[52] In *Public Prosecutor v Arokiasamy a/l Alphonso* [2012] 1 MLJ 165 the Court Appeal had once again re-stated the principles in considering the defence of unsoundness of mind. Hassan Lah JCA (as he then was) in his judgment held the defence of unsoundness of mind had not been proved.

[53] To my mind, in order to succeed, the accused must produce evidence to prove he was of unsoundness of mind at the time he committed the offence. In the present case the defence had not produced any evidence that shows he was of unsound mind at the material time. A mere statement in the accused's unsworn statement that he did not realise what actually happened cannot, by any stretch of imagination amount to evidence to prove he was of unsound mind at the particular time. It is a mere statement. Nothing more!

[54] As I had stated earlier there is no doubt the accused had stabbed and slashed the deceased. Having relied on the defence of unsoundness of mind as submitted by counsel for the defence, the defence needed to lead evidence to prove the status of the accused's mental capacity at the time when he stabbed and slashed the deceased. Looking through evidence in this case I could not find an iota of such evidence.

[55] It is true that in this case the accused was send to Hospital Bahagia Tanjung Rambutan for observation of psychiatrist, pursuant to an order by the court upon an application made by defence counsel, before the trial started. He was examined by a psychiatrist who had issued a certificate confirming the accused to be sane at the time of commission of the offence. This certificate was never produced to become an exhibit by the prosecution. The court may take judicial notice on the existence of the certificate as it was issued in pursuant to the court's order for the accused to be examined by a psychiatrist. In my view, nothing turns upon the failure to produce the certificate, since as stated earlier

A the defence bears the legal burden of proving the defence of unsoundness of mind and in my judgment this cannot be effectively proved by merely relying on the non-production of the certificate for that would amount to saying as the prosecution failed to prove that the accused is of sound mind therefore he must be of unsound mind. Such an argument is based on perverse logic.

B

[56] Having considered the accused's unsworn statement, I am of the view his statement does not possess of high quality evidence to be said to have succeeded in raising doubt to the prosecution's case. In my view the statement revealed that he had committed the act of causing death to the deceased. In C considering the weight to be attached to the statement I had considered the fact that the accused was not subjected to cross-examination by the prosecution. Without been tested with the cross-examination I found the statement of the accused that he could not realise anything subsequent to be spurned by the deceased to be a hollow, devoid of any substance.

D

[57] I must also reiterate that the defence of unsoundness of mind was only raised through his statement without any other evidence to support it. I found on the totality of evidence, the accused had failed to prove his defence of E unsoundness of mind. Furthermore, having the benefit of audio visual and having observed the conduct of the accused during the entire trial, I do not for one moment think that the accused could be suffering from an unsound mind. On the contrary the accused, in my observation, was lucid at all times during trial.

F

[58] In subjecting the entire evidence on a maximum evaluation I had also considered whether through the unsworn statement of the accused a defence of sudden and grave provocation can be established. Although it was never been raised and argued by the defence, I consider this approach that I am taking is G permissible in view of my duty of undertaking a maximum evaluation of evidence although I must hasten to add that I am not saying that this approach must be undertaken by a trial court. In the present case, the sudden and grave provocation could be raised as a result of the deceased's refusal to proceed with their plan of getting married. Her refusal could have provoked the accused to H stab her. This defence is provided as exception under s 300 of the Penal Code. If this defence is successfully proved, the act of causing death will only become an offence of culpable homicide not amounting to murder punishable under s 304 of the Penal Code.

I **[59]** It cannot be gainsaid that the accused had to prove this defence also. Unfortunately in the present case, I found the accused's unsworn statement was not enough to prove the defence. A mere refusal to go through with the planned marriage, of itself, will not, in my judgment constitute a grave and sudden provocation. The refusal may have provoked a reaction from the

accused but not to the extent of committing a murder. It may require something more serious to turn that spurn into a provocation.

[60] For the foregoing reasons I found the prosecution had proved the case against the accused beyond reasonable doubt. I therefore found the accused guilty as per the charge and convicted him for an offence punishable under s 302 of the Penal Code. Accordingly the only sentence available is death as provided under the section and I so order.

Accused found guilty, convicted and sentenced to death.

Reported by Ashgar Ali Ali Mohamed